SUPREME COURT, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1958.

No. 11.

NATHANIEL HARRIS,
Petitioner,

v.

UNITED STATES OF AMERICA.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

BRIEF FOR THE PETITIONER.

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BRIEF FOR THE PETITIONER.

OPINION BELOW.

The opinion of the Court of Appeals (R. 124-131) is reported at 248 F. 2d 196.

JURISDICTION.

The judgment of the Court of Appeals was entered on October 2, 1957 (R. 132). The petition for a writ of certiorari was filed on October 31, 1957, and was granted on June 30, 1958 (R. 133). The jurisdiction of this Court is invoked under 28 U. S. C., § 1254 (1).

QUESTIONS PRESENTED.

(1) Whether, in a prosecution for purchasing a narcotic drug other than from the original stamped package and for receiving and concealing this drug knowing that it had been imported contrary to law, consecutive sentences could validly be imposed on a jury finding of the single fact of possession of narcotics or on a court's charge which failed to require findings as to the necessary elements to constitute these two separate charges.

(2) Whether, in a narcotic prosecution involving three defendants in which the government relies on statutory presumptions which flow from the single fact of possession, it is sufficient to instruct the jury to merely find possession in defendants, or either of them.

STATUTES INVOLVED.

The Narcotic Drugs Import and Export Act, Sec. (2) (b) and (2) (d), 43 Stat. 657 (21 U. S. C. 173):

> It is unlawful to import or bring any narcotic drug into the United States or any territory under its control or jurisdiction; except that such amounts of crude opium and coca leaves as the board finds to be necessary to provide for medical and legitimate uses only, may be imported and brought into the United States or such territory under such regulations as the board shall prescribe, but no crude opium may be imported or brought in for the purpose of manufacturing heroin. All narcotic drugs imported under such regulations shall be subject to the duties which are now or may hereafter be imposed upon such drugs when imported.
>
> Any narcotic drug imported or brought into the United States or any territory under its control or jurisdiction, contrary to law, shall (1) if smoking opium or opium prepared for smoking, be seized and summarily forfeited to the United States Government without the necessity of instituting forfeiture proceedings of any character; or (2) if any other narcotic drug, be seized and forfeited to the United States Government, without regard to its value, in the manner provided by sections 514 and 515 of Title 19, or the provisions of law hereafter enacted which are amendatory of, or in substitution for, such sections. Any narcotic drug which is forfeited in a proceeding for condemnation or not claimed under such sections, or which is summarily forfeited as provided in this subdivision, shall be placed in the custody of the board and in its discretion be destroyed or delivered to some agency of the United States Government for use for medical or scientific purposes.

Section 2 (c) of the Narcotic Drugs Import and Export Act, 65 Stat. 767 (21 U. S. C. 174), provides as follows:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitate the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. For a second offense, the offender shall be fined not more than $2,000 and imprisoned not less than five or more than ten years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than ten or more than twenty years.
>
> Whenever on trial for a violation of this subdivision the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

The Internal Revenue Code of 1954, Sections 4701, 4703, 4704 (a), 7237 (a), 68A Stat. 549-550, as amended 69 Stat. 3. (26 U. S. C. Supp. III, 4701, 4703, 4704 (a), 7237 (a):

Section 4701. Imposition of tax.

> (a) **Rate.**—There shall be imposed an internal revenue tax upon narcotic drugs, produced in or imported into the United States, and sold, or removed for consumption or sale, at the rate of 1 cent per ounce, and any fraction of an ounce in a package shall be taxed as an ounce. The tax imposed by this subsection shall

be in addition to any import duty imposed on narcotic drugs.

(b) **By whom paid.**—The tax imposed by subsection (a) shall be paid by the importer, manufacturer, producer, or compounder (Aug. 16, 1954, c. 736, 68A Stat. 549.)

Section 4703. Affixing of Stamps.

The stamps provided in section 4771 (a) (1) shall be so affixed to the bottle or other container as to securely seal the stopper, covering, or wrapper thereof. (Aug. 16, 1954, c. 736, 68 A Stat. 550.)

Section 4704. Packages.

(a) General requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found.

Section 7237. Violation of laws relating to Narcotic Drugs and to Marijuana.

(a) Violation of law relating to opium and coca leaves and marijuana.—Whoever commits an offense or conspires to commit an offense described in part I or part II of subchapter A of chapter 39 for which no specific penalty is otherwise provided, shall be fined not more than $2,000 and imprisoned not less than 2 years or more than 5 years.

For a second offense offender shall be fined not more than $2,000 and imprisoned not less than 5 or more than 10 years. For a third or subsequent offense, the offender shall be fined not more than $2,000 and imprisoned not less than 10 or more than 20 years. * * *

STATEMENT.

In a two-count indictment returned on February 17, 1956, in the United States District Court for the Eastern District of Missouri, petitioner, Gladys Stamps, and Clarence Robinson were charged with (1) unlawfully purchasing from an unknown person on February 8, 1956, 224 grains of heroin other than in or from the original stamp package in violation of 26 U. S. C. 4704 (a); and (2) receiving and concealing and facilitating the concealment of this heroin on the same date, knowing that it had been imported contrary to law, in violation of 21 U. S. C. 174 (R. 1-2). The jury found all three defendants guilty on both counts (R. 121). Petitioner was given consecutive sentences of five years imprisonment and a one-dollar fine on each count, making an aggregate sentence of ten years imprisonment and a two-dollar fine (R. 122-123). This was the maximum sentence of imprisonment permissible under the statutes for a first offender. On appeal petitioner's conviction was affirmed (R. 124-131).

Evidence adduced at the trial by the Government may be summarized as follows:

On February 8, 1956, at about 2:00 A. M., two St. Louis police officers, named Robinson and Foxworth, looked into separate windows on the ground floor of an apartment at 4567 McMillan Avenue, one officer standing on a can and the other on a grating and both peering through a gap between the shade and sill of the windows (R. 14, 39). Officer Robinson saw defendant Stamps standing alongside defendant Robinson, who was seated next to a bed on which there was white powder on a mirror (R. 15). Defendant Robinson had his hands in this powder (R. 34). Officer Foxworth saw petitioner looking at something he was holding in his left hand and over which he made a motion with his right hand (R. 39-40). When the officers went to the door

of the apartment and announced from the hallway that they were police officers the individuals in the room fled presumably through a window (R. 17, 41). The officers recovered the powder on the mirror, some filled capsules, a box of empty capsules, two syringes with needles attached and a flour sifter. Some capsules were taken from a lady's coat found in the room (R. 18-23, 42-44). The officers turned this evidence over to the Federal Narcotics authorities (R. 24, 67-69). It was shown that about 221 grains of heroin, including 169 or 174 filled capsules were seized (R. 5-6). The heroin and paraphernalia were identified in evidence as Exhibits 1, 2 and 3 (R. 4-6, 20).

Petitioner's defense was an alibi. Petitioner and Stamps both testified that he was not present in the room at 4567 McMillan on the night of the raid (R. 76-77, 86-88). Miss Stamps and Gola Mason testified that Mason (not petitioner) was the person present in the room with her and Robinson on that night (R. 76, 94-95).

In the charge to the jury the trial judge read the pertinent provisions of 26 U. S. C. 4704 (a) and 21 U. S. C. 174, including the provisions by which possession of unstamped narcotic drugs is made prima facie evidence of a violation of 26 U. S. C. 4704 (a), and the provisions by which such possession shall be deemed sufficient to authorize conviction unless defendant explains possession to the satisfaction of the jury under 21 U. S. C. 174, and the two counts charged under those sections (R. 105-107). Continuing, immediately thereafter, the court instructed (R. 107):

> "So the question under each count of this indictment resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of February of this year, out there in the room at 4567 McMillan, identified here in evidence."

The court then defined "unlawfully," as used in the indictment, to mean "without legal justification or without

authority of law" (R. 108). The court further charged as follows (R. 110-112):

"Now, under the law as provided for the offense charged in Count 1 of the indictment, for the unlawful purchase of a narcotic drug, the absence of appropriate tax paid stamps from the narcotic drugs in one's possession shall be prima facie evidence of a violation of the law on which Count 1 is based, as I read it to you, by the person whose possession of such drugs may be found.

"So, if you find and believe from all the evidence beyond a reasonable doubt, that the defendants or either of them possessed the narcotics mentioned in Count 1, and that the said narcotics did not bear the required Internal Revenue tax stamps, then you will find the defendants or either of them guilty as charged in Count 1. Unless you so find, you will find the defendants, and each of them, not guilty.

"Now, under the law as provided for the offense charged in Count 2 of the indictment, the law provides that when on trial for receiving and concealing and facilitating the concealment of a narcotic drug, the defendants, or either of them, are shown to have had possession of such drug, such possession shall be deemed sufficient evidence to authorize the conviction of the defendants, or either of them, unless the defendants, or either of them, explain their possession to your satisfaction. By explaining their possession to your satisfaction as used in the statute, is meant that if the defendants or either of them, had possession of the narcotic drug they will have to explain that it came to them legally, and without the explanation you would be authorized to find the defendants, or either of them, guilty as to Count 2 of the indictment. The possession contemplated by the statute which applies to Count 2 of the indictment need not be personal and exclusive. It need not be immediate. It is sufficient

that the evidence shows the defendants, or either of them, to have had possession of the narcotic on February 8, 1956, at 4567 McMillan.

"The court instructs the jury that unless you find that the defendants, or either of them, had possession of the narcotics mentioned in Counts 1 and 2 of the indictment, and unless you find and believe that such narcotics were under the dominion and control of the defendants, or either of them, at the time and place mentioned in the indictment, you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2.

"The court further instructs the jury that a person has possession of a thing or object who has physical control of the thing or object with the intent to exercise such control, or having had such control, has not abandoned it and no other person obtained possession."

The Court below affirmed the conviction and held that the single fact of possession justified two cumulative sentences. It rejected petitioners' argument that since the conviction on both counts rested upon statutory presumptions and not upon independent evidence, a cumulative sentence based solely on the presumptions flowing from the single act constituted double punishment (R. 128-130). The Court found that the instructions sufficiently and correctly instructed the jury of what it was necessary for them to find "from the evidence in respect to each of the individual defendants beyond a reasonable doubt in order to convict on each count of the indictment" (R. 128). Petitioner's contention that no double punishment could be imposed in the absence of instructions requiring the jury to find the additional facts distinguishing the counts was answered with the statement that "the instructions fully and accurately covered the applicable provisions of the section of the statutes and clearly defined the conditions for conviction" (R. 131).

SUMMARY OF ARGUMENT.

1. Separate statutory provisions make it an offense to purchase narcotic drugs from an unstamped package and a crime to receive and conceal such drugs with knowledge of illegal import. Both statutes have presumptions which place upon a person found in possession the burden of going forward with his defense. Petitioner and two others, charged in a two count indictment with violating both statutes, were seen in a room in which heroin was found immediately after their departure. At the trial, after reading the indictment and the statutes under which defendants were charged, the court instructed that "the question under each count . . . resolves down to whether or not the defendants, or either of them, did possess this narcotic drug . . ." The jury, in finding petitioner guilty under both counts of the indictment, thus found the single act of possession of narcotics. The maximum sentence of imprisonment was imposed on each count to run consecutively.

The action of the trial judge in reducing the issue under each count to possession constituted a merger of offenses which eliminated any power to impose cumulative sentences and the jury finding of the single fact of possession of heroin coupled with the statutory presumptions which placed upon petitioner, on proof of possession, the burden of going forward with his defense will not support such double punishment.

The decision in **Gore v. United States**, 357 U. S. 386, permits the imposition of consecutive sentences on a seller of narcotics for violation of three different provisions relating to the drug. A legislative intent to multiple punishment was found to be discernible. Perhaps, Congress did not intend to make consecutive sentences applicable to possession of heroin. The unlawful import act in 1909

was the initial step of Congress to control narcotics while the enactment of stamped package offense in 1919 had as one of its purposes making "criminally liable, any person having in his possession any amount of the habit-forming drug."

But, even under the assumption that **Gore** foreclosed the issue of separate offenses and that the crimes charged are two as a matter of statutory construction, double punishment may only be imposed if certain fundamental procedure is followed. The grand jury and prosecutor must choose to charge in separate indictment counts and the separate charges must not be abandoned at the trial. The evidence must show two separate violations and the instructions must require findings of different crimes.

Under the same evidence test followed in **Blockburger v. United States**, 284 U. S. 299, the test to be applied to determine whether there are two offenses or one is whether each statutory provision "requires proof of an additional fact which the other does not." Because of the presumptions, each statute here involved merely requires proof of possession. At the trial, the two offenses became unitary when no evidence was introduced of any additional fact which would distinguish them. In any event, the instructions did not require the finding of an additional fact in one count which the other did not contain and the gist of the jury verdict was possession in each count.

Where, under the evidence, one crime is necessarily incidental and included in another, cumulative punishment has been disallowed under a doctrine sometimes called merger of offences. For example, possession and transportation of intoxicating liquor might constitute two offenses but if the evidence only shows a possession necessarily incidental to the transportation, the punishment may only be single. If possession of contraband is a necessary and incidental part of its transportation under evidence which

fails to disclose a possession apart from transportation, possession in one count, in this case, is likewise inseparable from a possession in another count. In the area of multiple punishment, any ambiguity should be resolved in favor of lenity.

A single finding of possession may not be the basis of a double punishment without violating the Double Jeopardy Clause.

2. The instructions were insufficient in not requiring the jury to find the elements of the crime or crimes charged. Moreover, the court permitted a conviction of petitioner if any of his co-defendants had possession of the narcotics and, since petitioner's defense was an alibi, the jury may have convicted him even if it believed all of his evidence.

ARGUMENT.

I.

A jury finding of the single fact of possession of heroin coupled with statutory presumptions which placed upon petitioner, on proof of possession, the burden of going forward with his defense will not support consecutive sentences under charges of (1) purchasing heroin from an unstamped package, and (2) receiving and concealing the heroin knowing that it had been imported contrary to law.

In **Gore v. United States**, 357 U. S. 386, the defendant was found guilty and consecutive sentences were imposed under counts charging (1) a sale of narcotics not in pursuance of a written order, (2) the purchase, sale, dispensing, and distribution of these drugs from an unstamped package, and (3) facilitating the concealment and sale of the same drugs with knowledge of unlawful import. Gore moved to vacate the sentence contending that consecutive sentences could not properly be imposed under such an indictment and that **Blockburger v. United States**, 284 U. S. 299, should be overruled as not being in accord with legislative history. This Court rejected his contentions, holding that Congress was not merely giving different labels to the same thing, that the counts were not simply different descriptions of the same offense and that the disregarding of different restrictions in the course of one transaction could constitute multiple offenses which might be punished cumulatively. This Court also found that the constitutional prohibition against double jeopardy was not offended by punishment for each of the separate offenses for which Gore had been sentenced and that the charges were not merely different descriptions of the same offense.

The **Gore** and **Blockburger** cases involved crimes of the peddlers or traffickers while the instant case involves

crimes of the possessors. The Gore case also contains a charge of different acts in each count in connection with different Congressional restrictions. Count one charged merely a sale, count two charged purchase, sale, dispensing and distribution, and count three alleged facilitating the concealment and sale. Narrowly, the allegation of sale in counts two and three might be considered to be surplusage.

But the issues involved in this case do not merely rest on narrow distinctions. No issue touching the conviction was before this Court in **Gore**. It is petitioner's contention that the prosecution proved only the single fact of possession of heroin, and that under such proof, it was error to impose cumulative sentences on each count. Even if the proof showed more than possession, the jury only found possession of heroin under the instructions. The action of the trial judge, in its instructions, in equating the charge under both counts with mere possession constituted a merger which eliminated any power to impose consecutive sentences. An examination of the statutory presumptions, proof and instructions is accordingly necessary.

The two-count indictment charged petitioner and two others with (1) purchasing heroin other than in or from the original stamped package and (2) receiving and concealing this heroin knowing that it had been imported contrary to law. Section 4704 of the Internal Revenue Code of 1954, insofar as here pertinent, makes it an offense to purchase a narcotic drug other than from the original stamped package and provides that the absence of tax paid stamps from narcotic drugs "shall be prima facie evidence of a violation of this subsection by the person in whose possession the same may be found." Section 174 of Title 21 makes it an offense to receive, conceal or purchase a narcotic drug knowing that it has been imported contrary to law, and provides that whenever "the defendant is shown to have or to have had possession of the narcotic drug such

possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

The two statutory presumptions "are not evidence in a proper sense, but simply regulations of the burden of proof." **Casey v. United States**, 276 U. S. 413, 418. The presumptions place the burden upon the party found in possession to explain and justify it when accused of the crimes that the statutes create on the theory that it is his burden to prove facts peculiarly within his knowledge and hidden from discovery by the government. But these presumptions do not reduce the crime to one of mere possession or shift the burden of proof. They merely place upon the accused, at a certain point, the burden of going forward with his defense. **Roviaro v. United States**, 353 U. S. 53, 63. See also **Morrison v. California**, 291 U. S. 82, 88.

Possession of narcotics could elicit counts of (1) purchase of narcotics from an unstamped package; (2) buying illegally imported narcotics; (3) receiving illegally imported narcotics; (4) concealing illegally imported narcotics, and (5) facilitating the transportation of illegally imported narcotics.[1] Indeed, the wording of the presumption statutes is broad enough to encompass additional counts of sales and dispensing on evidence of mere possession such as (1) selling narcotics from an unstamped package; (2) dispensing narcotics from an unstamped package; (3) sale of narcotics without a written order form and (4) selling illegally imported narcotics.[2] But such a con-

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[1] *Martinez v. United States*, 1 Cir., 220 F. 2d 740.

[2] The government regularly obtains multiple convictions aided by the statutory presumption that possession evidenced multiple violations. See Statement of Assistant Attorney General Warren Olney, III, in Hearings Before the Subcommittee on Traffic in, and Control of Narcotics of the House Committee on Ways and Means, 84th Cong., 2d Sess. 1195 (1956): "Because of the various presumptions of guilt arising from the possession of narcotics in

struction holding proof of possession sufficient to authorize convictions for sales and dispensing would probably be invalid as not constituting a rational connection between the fact proved and the ultimate fact presumed.[3]

The government rested its case on the two statutory presumptions and evidence of possession. The view of the trial judge that possession alone was proved is apparent from the instructions. The court below, in rejecting petitioner's argument that the single fact of heroin would not justify cumulative sentences, tacitly adopted this interpretation in concluding that a single act which violates two statutes is punishable under both (R. 129-130). The evidence showed that the police, peering through the windows, saw petitioner in a room with two other persons, that all the occupants fled upon learning of the arrival of the police and that heroin, two syringes with needles attached and a flour sifter were found in the room. It is only in this court that the government has attempted to find evidence other than possession to support a two-count conviction, saying (Brief for the United States in Opposition, p. 9):

> "Actually, in this case there was adequate proof of separate acts. The defendants were in actual receipt and in the process of concealing the heroin in violation of 21 U. S. C. 174, when they were apprehended. The nature of their activities was such as to indicate that they knew it had been imported contrary to law. In view of the absence of stamps, there was also justification for concluding that an illegal act of purchase, separate from the receipt and concealment, has occurred."

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several of the narcotic statutes the prosecution of narcotic violators once they have been apprehended actually presents no great problem. As a matter of fact it is our opinion that narcotic violators are frequently convicted on evidence that would not suffice in most other types of cases."

[3] *Tot v. United States*, 319 U. S. 463.

This endeavor to find proof of separate acts illustrates that the two offenses charged were actually merged in the evidence. One offense was necessarily included and incidental to the other. The statement that defendants were in actual receipt is equivalent to saying defendants were in possession since possession implies receipt. There is nothing in the evidence to indicate when and where the narcotic drug was received nor how long it was possessed. The argument that defendants were in the process of concealing the heroin is merely a statement that any possession includes concealment from others. The contention that the nature of their activities indicated that they knew the drug had been imported contrary to law means no more than saying that intent, knowledge or state of mind is generally shown from all the circumstances in the evidence. The argument that the absence of stamps was justification for concluding that an illegal act of purchase had occurred is equivalent to inferring an illegal purchase from the possession of the drug. The result of its position is that two offenses may be inferred from the single fact of possession and that two offenses are necessarily included and incidental to the act of possession unless a jury chooses to accept a defense explanation as to one count and to reject it on the other count. And this doctrine may be extended to the total of from five to nine counts which may be presumed from possession.

Moreover, it is immaterial whether or not there was evidence apart from possession to sustain multiple violations. A reading of the trial judge's charge makes it evident that the jury found only the single fact of possession.

After reading to the jury the statutes and indictment under which petitioner was charged (R. 105-107), including the presumptions, the court immediately thereafter instructed that "the question under each count * * * resolves down to whether or not the defendants, or either of them, did possess this narcotic drug on the 8th day of

February of this year, out there in the room at 4567 McMillan * * *'' (R. 107). The trial judge then reiterated that if the jury found defendants in possession that "you will find the defendants'' guilty under count 1 (R. 110-111). This clearly told the jury that if they found possession that they must find the defendants guilty. The court further told the jury that if they found defendants had possession and did not explain that possession came to them legally "you would be authorized'' to find the defendants guilty under count 2 (R. 111). No defendant offered any evidence nor was there any evidence in the record to show that possession came to defendants legally. Therefore this instruction in effect told the jury that if they found possession, they were authorized to find the defendants guilty. It would have been inconsistent for the jury to have found defendants guilty under the first count without also finding them guilty under the second count. The court then concluded its factual instructions by informing the jury that unless you find the defendants had possession "you must acquit the defendants, or either of them, who did not have possession of the narcotics mentioned in Counts 1 and 2 (R. 111). The next portion of the charge was a definition of possession (R. 111-112).

The instructions as a whole obscured any difference that might exist in the two charges. While the court read both statutes and both counts to the jury, the effect of this part of the charge was completely nullified when the court concluded it by saying that the question under each count resolves down to whether or not defendants did possess this narcotic drug (R. 105-107). By so reducing the question to mere possession, the trial court eliminated any requirement that the jury find any separate elements contained in either count. It may be noted that the court in charging the jury on intent told them that it was not enough to find the defendants did "the acts complained of'' but that the jury must find that the acts were intentionally done (R. 108). However, it would be guessing to conclude

that the jury would understand these remarks in the intent portion of the instructions to mean they should therefore find the elements of each charge and not just possession. The charge also stated that it was the position of the government that petitioner purchased the narcotics under count one and received and concealed them under count two. But the charge also pointed out the petitioner's position that he was not present "at the time and place of the commission of the offense charged in the indictment" and that the jury should acquit if they had a doubt that petitioner was present "at the time and place of the commission of the offence charged in the indictment" (R. 110). It was at this point that the court told the jury that if they found possession they will convict under count one and they would be authorized to convict under count two (R. 110-111).

In **Bollenbach v. United States**, 326 U. S. 607, petitioner was convicted of conspiracy to transport securities in interstate commerce. There were three different and conflicting theories regarding a charge whose function was to guide the jury in determining guilt. An erroneous instruction was given that possession of stolen property in another state than in which it was stolen raises a presumption that the possessor was the thief and transported stolen property in interstate commerce but that such presumption was subject to explanation. The court recognizing that "legal presumptions involve subtle conceptions to which not even judges always bring clear understanding" reversed on the ground that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. If the instant charge is equivocal as to whether the jury merely found possession, such doubts should be resolved in favor of the defendant. A cumulative sentence should not rest on an equivocal charge on a major question.

It is apparent that the trial judge considered possession to be the gist of both charges and directed a verdict of

guilty on the mere finding of possession. The jury verdict was thus a finding of possession under both counts on the only question submitted to it.

There are certain fundamental principles which must be followed in any criminal case. The accused must be prosecuted by indictment or information and the grand jury and the prosecutor must decide whether to proceed in single or multiple counts. If they choose single counts, the defendant may not be punished for a single offense even if by duplicity multiple charges are alleged. In any multiple count accusation, the prosecutor may elect to proceed on only part of the counts. But, in order to impose consecutive punishment, at least two counts must be charged, the evidence must show multiple violations and the instructions must require findings of different crimes.

The problem of multiple sentences may be a perplexing one[4] but it would seem that whatever test is applied to determine whether cumulative sentences may be imposed, petitioner should not be doubly punished under the evidence in this case, the jury's finding and the court's instructions.

The most common rule applied in the lower federal courts is the same evidence test whose leading precedent is **Blockburger v. United States**, 284 U. S. 299, 304:

> "Each of the offenses created requires proof of a different element. The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. Gavieres v. United States, 220 U. S. 338, 342, 52 L. Ed. 489, 490, 31 S. Ct. 421, and authorities cited. In that case this

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[4] Note, Consecutive Sentences in Single Prosecutions: Judicial Multiplication of Statutory Penalties, 67 Yale L. J. 916.

> Court quoted from and adopted the language of the Supreme Court of Massachusetts in Morey v. Com., 108 Mass. 433: 'A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.' * * *"

Under a superficial examination, the elements necessary under count one are that (1) defendants purchased the drug and (2) the drug was from an unstamped package and the required incidents under count two are that (1) defendant received the drug, (2) the drug so possessed had been unlawfully imported and (3) defendant had knowledge of the illegal importation. But such an examination would be an artificial one because it does not take into account the fact that the very statute itself which defined the crime also facilitated its proof by creating the presumptions. Congress itself has said through these presumptions that evidence, possession, which sustains one conviction sustains the other. And the test "is whether each provision requires proof of an additional fact which the other does not." Each statute does not require proof of an additional fact which the other does not. Each statute only requires proof of possession.[5] Thus the evidence which would sustain a conviction on the first count would also prove the second count. It would also be sufficient to

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[5] A statement of the proof necessary is found in *Roviaro v. United States*, 353 U. S. 53, 71 (dissenting opinion):

> "I come now to the necessary proof required for a finding of guilt under count 2. All that is necessary here is proof of possession of unstamped narcotics, such as heroin. The direct, uncontroverted evidence of possession, as well as transportation, is in the record. * * * Under the Narcotic Drugs Act, 65 Stat. 767, 21 U. S. C., § 174, 21 U. S. C. A., § 174, this alone is prima facie evidence of guilt. Petitioner did not rebut it. * * *"

See also *Velasquez v. United States*, 10 Cir., 244 F. 2d 416.

sustain additional counts charging (1) the buying of illegally imported narcotics and (2) facilitating the transportation of illegally imported narcotics. Count 2 could also have been split into separate counts charging receipt and concealment. Significantly at the trial, the same evidence, possession, did in fact sustain both charges and the jury, under the court's instructions solely, found possession.

There would be little practical difference if Congress had said that possession was a crime and hade made it a defense to a prosecution for possession of narcotics if the accused shows the narcotics are from a stamped package or that the drugs are legally imported. Indeed Congress intended to facilitate the conviction of the possessor when it enacted the stamp tax.

The 1909 import statute (35 Stat. 614) was the original act aimed at suppressing narcotic drugs. It was followed by the 1914 Harrison Narcotic Act (38 Stat. 785) which made it an offense to sell without order forms and also made unlawful possession by an unregistered person. By the Act of February 24, 1919 (40 Stat. 1130), Congress provided for a stamp tax and made unlawful the purchase, sale, dispensing, or distributing of the narcotic drugs unless in or from the stamped package. The occasion for the additional tax was the decision in **United States v. Jin Fuey Moy**, 241 U. S. 394, which eliminated the effectiveness of the 1914 Harrison Act by holding that Section 8, punishing the possession of narcotics by "any person not registered," did not apply to any person who was not in the class required to register. The congressional report said that "under that decision it was impossible to hold criminally liable a person having in his possession any amount of the habit-forming drug * * * unless such person is a dealer therein. The proposed bill, § 108, amends that Act so as to place an internal revenue tax, payable by stamp, on such drugs and provides that possession of an

unstamped package shall be prima facie evidence of a violation of that Act." H. Rep. No. 767, 65th Cong., 2d Sess., September 3, 1918, 1939-1 Cum. Bull. (Pt. 2) 113.

Realistically Congress meant to make possession an offense. These statutes were enacted under the commerce and revenue powers presumably to avoid constitutional objection. See 43 Cong. Rec. 1396-1400 (1909). And the Harrison Act barely survived constitutional test.[6]

The congressional explanation of the differentiation in penalties under the Narcotic Control Act of 1956 (70 Stat. 569) is not without significance. In H. Rep. No. 2388, 84th Cong., 2d Sess., p. 2, the offense against the narcotic drug import and export act is discussed as an offense of the "trafficker" while the stamped package offense is treated as that of the "possessor." Each offense in the instant case serves the same purpose and is the same in character. Both are offenses of the "possessor." Any other conclusion would always make the possessor a trafficker.

In any event, the instructions did not require the finding of additional fact in one count which the other did not have. In the absence of such a finding, cumulative sentences should not have been imposed. The jury was merely told to convict if they found possession of heroin in accordance with the statutory presumptions. But the jury was not specifically required to find any elements distinguishing the two offenses charged. Rather did the Court permit this finding of the sole element of possession to be the basis for a guilty verdict on both counts

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[6] *United States v. Doremus*, 249 U. S. 86; *Alston v. United States*, 274 U. S. 289; *Nigro v. United States*, 276 U. S. 332. The constitutionality of the narcotic statutes could most likely be sustained without reference to their revenue features in view of the expanded scope of the commerce clause, see *United States v. Darby*, 312 U. S. 100, 114, and because the narcotic laws are part of the scheme implementing treaty commitments of the United States, see H. R. Rep. No. 23, 63d Cong., 1st Sess. 2 (1913); *Alston v. United States*, 274 U. S. 289; Cf. *Missouri v. Holland*, 252 U. S. 416.

of the indictment. Even assuming that an instruction which rests on a presumption may be legally sufficient if it requires the jury to merely find the presumption, yet the failure to require the finding of an additional fact where both counts rest on substantially similar presumptions reduces the test in the **Blockberger** case to a mere formal one. The instructions merged the two counts and this merger eliminated the right to impose consecutive sentences. It is equivalent to a Court's requirement that the government elect which of two counts it intends to present to the jury and the government should have objected if it wished to keep the possibility of consecutive sentences alive. If the sentences had been concurrent, petitioner may have waived his right to complain in this regard by failing to accept the charge. But, the imposition of consecutive sentences made either the merger or the sentence fundamental error since under those circumstances, the finding of an additional fact distinguishing the counts was the most essential ingredient which should have been submitted to the jury.[7]

Usually, if there are two separately indictable offenses, the courts have allowed consecutive punishment. But where, under the evidence, one offense is necessarily incidental and included in another, cumulative punishment has been disallowed under a doctrine sometimes called merger of offenses. Cf. **United States v. Gumbs**, 2 Cir., 246 F. 2d 441, 442. **In re Nielsen**, 131 U. S. 176, 188-189, contains an early expression of this rule in a case which held that a conviction for cohabitation barred a prosecution for adultery. The Court rested its conclusion on the theory that unlawful cohabitation necessarily implied sexual intercourse, and stated (131 U. S. at 188-189):

> "* * * but be that as it may, it seems to us very clear that where, as in this case, a person has been

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[7] *Screws v. United States*, 325 U. S. 91, 107.

tried and convicted for a crime which has various incidents included in it, he cannot be a second time tried for one of those incidents without being twice put in jeopardy for the same offense.

"It may be contended that adultery is not an incident of unlawful cohabitation, because marriage of one of the parties must be strictly proved. To this it may be answered, that whilst this is true, the other ingredient (which is an incident of unlawful cohabitation) is an essential and principal ingredient of adultery; and, though marriage need not be strictly proved on a charge of unlawful cohabitation, yet it is well known that the statute of 1882 was aimed against polygamy, or the having of two or more wives; and it is construed by this Court as requiring, in order to obtain a conviction under it, that the parties should live together as husband and wives."

Numerous cases decided by the Appellate Court have held that when the facts established prove that one crime was necessary and incidental to the other, only one punishment may be imposed. Thus in **Schroeder v. United States,** 2 Cir., 7 F. 2d 60, 65, the defendant was convicted of possession and transportation of intoxicating liquor and the Court found that since the same facts proved both crimes that there might be only one punishment. The Court recognized that there might be possession distinct from transportation, such as possession for a substantial time followed by transportation which might constitute two distinct offenses, just as possession for a substantial time followed by a sale might amount to two distinct crimes. The Court concluded that where the only possession shown is that which is necessarily incidental to the transportation, the offense is single and not double. The Court concluded and said, 7 F. 2d 60, 65: "And the law is settled that, where a person is tried and convicted of a crime which has various incidents included in it, he cannot thereafter be tried and

punished for an offense consisting of one or more such incidents. To do so would be to inflict double punishment." We believe it would have been more appropriate to say that while two crimes were committed, it is unlikely to conclude that two punishments were intended. Generally an examination of the evidence is required to determine whether one offense is necessarily incidental to another. Thus in **United States v. Chiarella,** 2 Cir., 187 F. 2d 12, after examining the evidence, the Court found a count which charged possession and a count which charged receipt were not proved because each was included under a count which charged sale of conterfeit money and accordingly reversed the convictions on the first two counts. Cf. **Prince v. United States,** 352 U. S. 322.

Other examples are **Morgan v. United States,** 4 Cir., 294 Fed. 82 (manufacture of moonshine whiskey necessarily includes having possession of the whiskey and possessing property designed for manufacturing of moonshine); **Tritico v. United States,** 5 Cir., 4 F. 2d 664 (proof of possession of distillery apparatus necessarily included in proof of manufacture of liquor); **Gaunt v. United States,** 1 Cir., 184 F. 2d 284 (making a fraudulent statement within jurisdiction of department of United States by filing a fraudulent income tax return embraced within charge of attempting to evade income tax by filing a fraudulent return).

If possession of a forbidden article is a necessary and incidental part of transportation where the evidence fails to disclose a possession distinct from transportation, the possession in each count in the instant case is a necessary and incidental part of possession in the other count. And all the various incidents of both charges are included in possession.

In **United States v. Michener,** 331 U. S. 789, this Court reversed without opinion a decision of the Eighth Circuit,

157 F. 2d 616, where the issue was whether after a guilty plea consecutive sentences could be imposed on one count charging possession of a plate adapted for counterfeiting, and a second count charging that on the same date the accused caused the plate to be made. The per curiam reversal cited **Blockberger v. United States**, 284 U. S. 299; **Albrecht v. United States**, 273 U. S. 1 and **Gavieres v. United States**, 220 U. S. 338. The Eighth Circuit had held that the imposition of cumulative sentences constituted double punishment because it found inconceivable that any additional facts could have been adduced to distinguish the offenses under the two counts. The Court, however, conceded that "under a possible state of facts one could properly be convicted of the two offenses charged in the indictment", 157 F. 2d at 618. The Court below also relied on the concurring opinion in **District of Columbia v. Buckley**, D. C. Cir., 128 F. 2d 17, 21, which held that the application of the same evidence test did not end the matter but that it was necessary for the Court to determine if the difference was "substantial or minor." The reversal may have meant that the determination of the difference was a legislative matter. It should also be noted that the defendant pled guilty and thereby admitted all the facts alleged in each count. In the absence of an examination of the proof, one offense may not have been necessarily included in the other. There was also no issue as to whether the findings of the jury would support double punishment.

Moreover, even in the absence of presumptions, proof of the purchase of heroin knowing the same to have been illegally imported establishes every essential element of buying the same heroin from an unstamped package.[8] A tax is placed on the importation of narcotic drugs which must be paid by the importer and evidence of pay-

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[8] But see *Martinez v. United States*, 220 F. (2d) 740, 742.

ment is shown by the stamped package. Heroin may not be legally imported and illegal imported drugs are not in a stamped package. See Sections 4701 and 4703 of the Internal Revenue Code of 1954. It is true that a domestic manufacturer also has to pay the same tax. But the theory of conviction under count 2 is based on illegal import. The fact that Count 2 charges receipt and concealment instead of purchase is of no significance in view of the fact that the same presumption is applicable to both these offenses under 21 U. S. C. 174. Moreover, receipt and concealment are incidental and necessary parts of a purchase. And the supporting evidence does not so materially vary as to justify two punishments merely because two inferences are attached by different statutes to the same evidential basis. **Copperthwaite v. United States**, 6 Cir., 37 F. 2d 846, 848.

In the related area of lesser included offenses, the courts have never imposed cumulative punishment.[9] Accordingly, where the legislature has defined two distinct offences, but one offense requires proof of all the facts or elements necessary to establish the other plus an additional element, only one punishment may be imposed. In these situations, where the greater offense includes the lesser; it is proper to prosecute the accused under an indictment charging both offenses. If, however, the accused is convicted on both counts, sentences cannot lawfully be imposed on both counts to run consecutively. **Ekberg v. United States**, 1 Cir., 167 F. 2d 380, 385. See also **Rutkowski v. United States**, 6 Cir., 149 F. 2d 481; **Kostner v.**

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[9] See Rule 31 (c) of the Federal Rules of Criminal Procedure. The following are a few illustrations of application of the included offense doctrine. A defendant charged with murder may be convicted of manslaughter if the jury finds an absence of malice. *Stevenson v. United States*, 162 U. S. 313, 315-316, 321-323. A defendant charged with robbery may be found guilty of larceny if the jury finds an absence of force or putting in fear. *Lamore v. United States*, D. C. Cir., 136 F. (2d) 766.

United States, 4 Cir., 193 F. 2d 429; **Tritico v. United States**, 5 Cir., 4 F. 2d 664.

The recent cases of this court in the area of multiple punishment are based on an analysis of congressional intent. It seems apparent that the purpose of Congress in enacting these presumptions was to facilitate convictions and not to multiply sentences. When Congress desired to increase penalties, it did so directly in three separate enactments, the Act of August 12, 1937 (50 Stat. 627), the Boggs Act of 1951 (65 Stat. 767) and the Narcotic Control Act of 1956 (70 Stat. 567). "But when choice has to be made between two readings of what Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." **United States v. Universal C.I.T. Credit Corp.**, 344 U. S. 218, 221-222. "When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity." **Bell v. United States**, 349 U. S. 81, 83. And when choice has to be made between two interpretations of the court's instructions, before the harsher alternative is chosen, the court should have made clear the issues which, under a jury finding, would support cumulative punishment.

This court has recently held that punishment for each of separate offenses "and not merely different descriptions of the same offense" does not violate the constitutional prohibition against double jeopardy. **Gore v. United States**, 357 U. S. 386, 392. But the government would concede that multiple punishment for the same offense after a single trial would be a violation of double jeopardy. Brief for the United States, Gore v. United States, p. 38. In the instant case, the offense is single either under the statutes, the evidence or the findings of the jury under the instructions. Accordingly, punishing petitioner twice on the sole finding of possession constitutes double punishment.

II.

The instructions in charging the jury to find merely possession in defendants or either of them did not sufficiently and correctly instruct the jury of what it was necessary for them to find in order to convict on each count of the indictment.

If the standards of guilt which Congress has prescribed for the two statutes here involved require findings that petitioner did purchase herein from an unstamped package and that petitioner did receive and conceal the heroin with knowledge of an illegal import, the jury did not find those ingredients of the two statutes and the charge was erroneous in directing a verdict upon proof of a certain fact, possession.[10] Where the error in instructions is so fundamental as not to submit to the jury the essential ingredients of the crime or crimes on which the conviction rest, the Court must take note of the error on its own motion. **Screws v. United States,** 325 U. S. 91, 107. The Court in its instructions, as we have pointed out, did not tell the jury that the statutory presumptions merely shifted to the accused the burden of going forward with the evidence. Nor was the jury charged that that might infer guilt from possession, but the jury was in effect directed to return a conviction from proof of possession.[11]

Moreover, every time that the Court instructed the jury with regard to possession, it permitted a finding that "defendants, or either of them" did possess the drugs (R. 107, 111). The charge told the jury to convict petitioner if one of his co-defendants had possession of the narcotics. Such instructions were particularly prejudicial since petitioner's defense was to the effect that he had not been in the premises where the narcotics were found and co-

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[10] Cf. *Morris v. United States,* 10 Cir., 156 F. 2d 525.

[11] Cf. *Bates v. United States,* D. C. Cir., 219 F. 2d 30, 33.

defendant Gladys Stamps admitted she was in the room with the heroin. Under such instructions, the jury may have convicted petitioner even if it believed all of his evidence.

CONCLUSION.

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed.

Respectfully submitted,

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